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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION FIVE

**In re the Marriage of DEBRA C. and  
DURFEE L. DAY.**

**DEBRA C. DAY,**

**Appellant,**

**v.**

**DURFEE L. DAY,**

**Respondent.**

**A105146**

**(Marin County  
Super. Ct. No. FL 14678)**

Debra C. Day (Wife) appeals an order denying her motion to vacate a post-judgment settlement in the action dissolving her marriage to Durfee L. Day (Husband). She contends the trial court abused its discretion in refusing to vacate the order on grounds of mistake.

**BACKGROUND**

*July 2001 Judgment of Dissolution*

Wife initiated the dissolution proceeding in August 1998. In October 1999, the parties reached a settlement agreement at a bench/bar settlement conference. It provided, inter alia, that the parties would hold their Stinson Beach residence in equal shares as tenants in common, with Wife to have exclusive possession and pay all interest, principal, taxes, and insurance. In June 2002, they would have the residence appraised. If its value was greater than \$1,153,000, they would continue to own it as tenants in common for two

more years. If it had a lesser value, they could sell it immediately, dividing the sale proceeds equally between them. If Wife failed to make the obligatory payments on time, the property could be sold immediately.

The agreement also provided that Husband would pay monthly child support of \$1,500 for the parties' minor son and monthly spousal support of \$5,500 through June 2002, when spousal support would terminate "absolutely."

The settlement agreement was incorporated into the judgment of dissolution, filed July 25, 2001.

*November 22, 2002 Stipulated Order*

In March 2002, Wife moved for modification of child support, adjudication of assets omitted from the judgment, an order setting aside or, alternatively, enforcing the July 2001 judgment, and attorney fees.<sup>1</sup>

In support of her motion Wife declared: Husband had not served her with preliminary or final declarations of disclosure at the time of the October 1999 settlement conference. She felt pressured to sign the settlement agreement. She had since determined Husband had not disclosed a substantial amount of assets and had failed to disclose numerous investment opportunities subsequent to their separation. The amount of child support was substantially below support guidelines.

In May 2002, the court concluded Husband had fully disclosed all information regarding his assets and income. It reserved ruling on all other issues raised in Wife's March 2002 motion to set aside the judgment.

In July 2002, the court ordered Husband to advance Wife's attorney \$3,500 as attorney fees. It reserved jurisdiction over the ultimate allocation of fees and costs advanced, and again reserved ruling on the other issues raised in Wife's March 2002 motion.

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<sup>1</sup> The March 2002 filing was actually a supplemental filing to an earlier-filed motion which does not appear in the appellate record.

On November 7, 2002, the parties executed a stipulation regarding the reserved issues raised in Wife's March 2002 motion to set aside the judgment. On November 22, 2002, at the parties' request, the court incorporated their stipulation into an order.

The stipulated order contains the following provisions: the Stinson Beach residence would be refinanced for an additional \$120,000 above the existing principal balance. This sum would be paid in cash, divided equally, to the parties. A negative amortization loan was an acceptable form of refinancing. To obtain the best financing, the refinancing would occur in Wife's name as the owner of an occupied dwelling with title in her name only. Immediately upon close of escrow for the refinancing, title would be restored to the parties jointly as tenants in common. Husband would be responsible for the refinancing loan application and processing, and Wife was to cooperate and sign all documents necessary to effectuate the refinancing. The parties would share equally in the refinancing costs, which would be included in the principal amount of the mortgage. To complete the refinancing, Husband would advance any funds necessary for Wife, which she would hold in an account in her name. However, Husband would continue to own these funds, Wife was not to spend or transfer them, and she was to return any advanced funds to Husband when the refinancing was completed. Wife would use her \$60,000 half of the refinancing loan to pay off existing credit card debts. Husband would give Wife \$25,000 of his half of the loan, \$15,000 of which was expressly for her purchase of an automobile, and this \$25,000 would be characterized as spousal support. Wife would be responsible for all payments of principal and interest on the residence, including the refinanced mortgage.

The stipulated order further provided that Husband would pay wife nonmodifiable spousal support of \$2,300 per month, ending June 16, 2005, and child support of \$1,900 per month.

The stipulated order stated that the parties entered the agreement without coercion or duress, and, except as expressly modified by the instant agreement, the existing July 2001 judgment of dissolution was confirmed. It stated that Wife would dismiss with prejudice her pending, i.e., March 2002, motion to dismiss the July 2001 judgment, and

that she acknowledged Husband did in fact make a full and complete disclosure of his assets in the months immediately after she filed her dissolution petition, thereby fulfilling his obligation under Family Code section 2100 et seq.<sup>2</sup> It stated that Wife acknowledged that the instant settlement was fair and equitable and she was satisfied with its conditions.

Other than the provision about a negative amortization loan as an acceptable form of refinancing, the stipulated order contained no particulars regarding the refinancing, e.g., rate of interest, length of loan, points, etc. In short, the stipulated order would result in Wife receiving \$85,000: \$60,000 from her half of the \$120,000 refinancing loan, and \$25,000 from Husband's half of the refinancing loan.

*Post-November 22, 2002 Proceedings*

On April 30, 2003, Wife, in propria persona, moved for an order setting aside or enforcing the November 2002 stipulated order and setting aside the July 2001 judgment.<sup>3</sup> She also sought an upward modification of spousal and child support and an order that Husband "pay \$15,000 immediately as a retainer for an attorney to take my case." She asserted that Husband's income and expense statements used as the bases of the July 2001 judgment and November 2002 stipulated order were fraudulent, his data were never validated, and she executed the November 2002 stipulation under duress: Husband's impending one-month trip to Burma and her "dire" economic and emotional distress. She also asserted the November 2002 stipulated order was not workable because six lenders had denied the application for the refinancing loan, and she asked that Husband immediately pay her the "agreed-upon" \$85,000 from other sources.

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<sup>2</sup> Family Code section 2100 et seq. generally obligates both parties to disclose their assets and liabilities fully and accurately in the early stages of the dissolution proceeding, regardless of the characterization of the property, and imposes a continuing duty to update their disclosures if there have been any material changes. See Family Code section 2100, subdivision (c).

<sup>3</sup> Wife was represented by five successive attorneys between the 1998 filing of the dissolution action and the November 2002 stipulated order. She represented herself in the trial court for all remaining proceedings that led to the instant appeal. She is represented by counsel on appeal, pursuant to a trial court order awarding her \$2,500 from Husband for appellate attorney fees.

On May 5, 2003, Wife filed a separate motion for a modification of child support, based on essentially the same fraud and duress grounds as her April 2003 motion to set aside or enforce the November 2002 stipulated order and set aside the July 2001 judgment. She specifically asserted that Husband “ha[d] yet to perform on the” November 2002 stipulated order, with the result that she was obligated “to carry debts months longer than agreed upon.”

Husband opposed the motions on the grounds Wife was represented by counsel during the settlement that resulted in the November 2002 stipulated order, and she presented no basis for construing the stipulation as other than freely and voluntarily entered into.

Following a June 6, 2003 hearing on Wife’s motions to set aside the November 2002 stipulated order and to modify child support, the court (Judge Smith) issued a ruling which stated, in salient part:

“In her current motion, Wife initially seeks an order setting aside the [November 2002 stipulated order], and, if successful, a similar order setting aside the [July 2001 judgment]. She alleges that the [November 2002 stipulation] was signed under duress. . . . Case law[] provides that no duress exists where, as here, there is an opportunity to reflect on the proposed stipulation, and prior to signing, the obtaining of independent legal counsel. [Citation.] Here, Wife’s attorney filed the original motion to set aside the Judgment on March 28, 2002. The Stipulation which Wife seeks to set aside was signed by her and her attorney on November 7, 2002. Wife’s allegation that she felt pressured to sign the Stipulation because her husband was about to take a 30-day vacation, is insufficient to establish duress. The November 22, 2002 [stipulated order] specifically states that ‘This Agreement is being entered into without coercion or duress,’ and was approved by Wife and her counsel. [¶] Wife’s motion to set aside the original Judgment is also denied. In the [November 2002 stipulated order], Wife acknowledged that Husband had in fact made a complete and full disclosure of his assets prior to the Judgment.

“The [November 2002 stipulated order] assumes that the residential real estate can be refinanced for an additional \$120,000 over the existing loan, and that ultimately Wife will receive \$85,000 of those funds. Wife states that six lenders have thus far failed to complete the refinance. . . . If either party unreasonably fails to complete the refinance or it is impossible based on decisions of the lenders, the entire [November 2002 stipulated order] may be in jeopardy. Husband alleges a current application for refinancing should be finalized within four to six weeks. The Court continues Wife’s motion for enforcement 60 days to August 5[, 2003] . . . to determine whether the refinance has been completed, and if not, the effect on the [November 2002 stipulated order].”

The court also continued Wife’s request for attorney fees to August 5, 2003.

Following a contested hearing on July 17, 2003, the court (Judge Hochman) ordered the amount of child support to remain the same as set in the November 2002 stipulated order: \$1,900 per month. It found there was no change of circumstances warranting a modification. It also found that the “Family Law Court,” i.e., Judge Smith, “declined [Wife’s] Motion to Set Aside.”

On July 30, 2003, Wife filed a “supplemental reply” in which she stated she “filed this [April 2003] motion” to set aside the November 2002 stipulated order because, under the terms thereof, Husband agreed to pay her \$85,000, and he failed to do so within a reasonable time. She contended that Husband had not yet obtained the refinancing that was intended to provide her this sum, and there was no prospective date on which the refinancing would occur. She also contended she would not have entered into the November 2002 stipulated order, by which she agreed to dismiss her pending March 2002 motion to vacate the July 2001 judgment, had she known that as of August 2003 she would still be waiting for the agreed-upon \$85,000. She argued that her March 2002 motion to vacate should therefore be restored to the calendar because Husband failed to keep his part of the November 2002 stipulation.

Prior to the August 5, 2003 hearing, Husband submitted a declaration of Millie Anderson, a licensed mortgage broker, dated July 30, 2003. Anderson opined that the parties could obtain a loan on the Stinson Beach residence, and she was now helping

them do so. She declared that the current high demand for refinancing loans in Marin County caused a lengthy processing period. She anticipated completion of the parties' loan in 60 days so long as they both cooperated in the process.

At the August 5, 2003 hearing the court (Judge Smith, who presided over all further hearings) found that the parties were cooperating in the refinancing process, and continued the matter to October 7 to allow completion of that process. At the conclusion of this hearing the court stated: "I need from both of you [information regarding the refinancing]. Did [the property] get refinanced, and if it didn't, and you are still cooperating with part of the [November 2002 stipulated] order, then I will have to make a ruling on [Wife's] motion to set aside the November [2002 stipulated order]. [¶] If [Wife] continue[s] to cooperate . . . and [Husband and his attorney] will be able to refinance, and the earth doesn't stop rotating, all the things that can happen in 60 days, I am going to make my ruling."

The court's ensuing written order stated that the matter was continued 60 days to October 7, 2003, because, through no fault of the parties, additional time was needed to determine whether the agreed-upon refinancing of the Stinson Beach property was in fact possible. The order further stated that the court "intends to make its ultimate decision at the conclusion of the 60 days and assumes Wife will continue in her cooperation." The parties were ordered to inform the court in writing of the status of the refinancing 10 days prior to the October 7 hearing. The court also ordered that Wife continue to receive spousal support based on the November 2002 stipulated order. There was no discussion at the August 5 hearing regarding Wife's requested attorney fees, nor did the ensuing written order refer to them.

On September 16, 2003, Wife filed a "supplemental pleading for immediate financial relief." She argued that the proposed refinancing loan would require monthly payments greater than her current monthly income, that executing the loan would cause her financial ruin, and that the proposed loan constituted "a much greater consideration for [her] end of the" November 2002 stipulated order, which she had not agreed to. Rather, she entered into the November 2002 stipulation to take advantage of the favorable

mortgage rates that existed at the time, e.g., a three-year fixed rate mortgage at four percent. Also, she noted, her income was larger in November 2002. She asserted that the much higher interest rates of September 2003 made “unaffordable and impossible” the monthly payment on any refinancing loan that would be taken in September 2003.

Wife’s “supplemental pleading” also asserted that Husband’s delay in obtaining the refinancing had cost her \$6,812 in finance charges and \$16,337 in automobile repairs that would not have occurred had he obtained refinancing promptly after the November 2002 stipulated order. She requested reimbursement of these costs, plus \$6,450 for other reimbursable expenses she made on Husband’s behalf since 2001. She also requested appointment of a referee to monitor the terms of any refinancing to ensure the loan payments were within her current means.

On September 25, 2003, pursuant to the court’s instruction to keep it apprised of the refinancing status, Husband filed another declaration of mortgage broker Anderson, who declared: On August 17, 2003, Anderson notified Wife that the loan request was approved and informed Wife of the various repayment options available to her, based on her credit rating and lack of income. She instructed Wife on the steps necessary to complete the loan transaction and emphasized that Wife must submit the loan documents by September 11, 2003, because the rate expired on September 17, 2003. The lowest payment option as of August 17 was a monthly payment of \$3,943.13. The loan package available in August 2003 involved a monthly payment between \$200 and \$250 higher than the loan packages available in January 2003 due to the half point higher interest rates. Wife took no steps to complete the loan transaction after Anderson confirmed the loan approval with her on August 17, so the loan commitment expired on September 17.

Husband also filed a memorandum of points and authorities in “further” opposition to Wife’s motion “to set aside judgment and stipulation, etc.” He stated that Wife refused to participate in the final execution of the refinance documents, purportedly because she could not afford the payments on the new loan. He argued that Wife could not rely on this ground for vacating the November 2002 stipulated order because it was “clearly foreseeable” that an increase in the balance of the existing loan on the Stinson

Beach property would increase the monthly mortgage payments, for which Wife was responsible under the July 2001 judgment and the November 2002 stipulated order. He further argued that he had performed all his obligations under the November 2002 stipulated agreement, and it should not be set aside because Wife refused to comply with her obligation thereunder to cooperate in the refinancing process.

Wife then filed other variously captioned documents prior to the October 7, 2003 hearing in which she argued, in essence, that the November 2002 stipulated order was not executed as she intended and agreed to. Specifically, she argued that the November 2002 stipulation contemplated immediate refinancing to take advantage of the then-lower interest rates, which would have resulted in monthly payments no higher than she had been making and which were the maximum she could afford. She asserted that the November 2002 stipulated order obligated Husband to obtain the refinancing in a timely manner, and his failure to do so resulted in a loan package with monthly payments greater than her entire monthly income and the ruination of her credit rating. She reiterated her request for an award of attorney fees so she could engage the services of an attorney.

*October 28, 2003 Order*

The court's October 28 order after the October 7 hearing<sup>4</sup> states:

"1. The Court continued [Wife's] motion to set aside the [November 2002 stipulated order] to determine if the parties were able to refinance [the Stinson Beach residence] as agreed upon. Wife, who was represented by counsel, approved the [November 2002] agreement, which provided the parties would seek an additional \$120,000 over and above their existing loan, which was to be generally divided between the parties. No reference was made to a 4%, three year, fixed rate loan. [Husband] has now obtained refinancing, but Wife refuses to execute the documents. Their agreement provided that it was Wife's responsibility to sign all necessary documents and to pay both the original mortgage plus the newly refinanced amount plus taxes and insurance. By

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<sup>4</sup> Wife did not appear at the brief October 7 hearing, at which the court adopted its tentative ruling after clarifying an arithmetical calculation for Husband.

such refusal, Wife may be in violation of the [November 2002 stipulated order] although there is no motion by Husband pending to enforce its terms.

“2. The Court notes that the agreement also provided that if Wife does not pay the mortgage or tax payments when due, the home shall be listed for sale and Husband’s obligation to pay spousal support would be terminated.

“3. By Husband’s inability to obtain and present Wife financing, from November 22, 2002 until August 17, 2003, Wife is entitled to her 2003 car repairs in the total amount of \$1,060.70, which represents the amount she would not have had to incur if the refinancing was timely presented. Additionally, the [November 2002 stipulated order] provided that upon refinancing[,] Wife’s credit card debt would be paid off and she is entitled to reimbursement of the interest paid through September, 2003 in the amount of \$6,129.”

“4. ....

“5. All other motions are denied.”

On December 23, 2003, pursuant to Wife’s motion, the court ordered Husband to pay Wife the car repair and credit card interest repayment funds awarded her in the October 28 order, plus interest, no later than January 7, 2004. If he did not, the court would overturn the November 2002 stipulated order.

On December 30, 2003, Wife, in propria persona, appealed the October 28, 2003 order “denying her post-judgment motion to set aside the November 22, 2002 Stipulation and Order and to restore to calendar her then-pending [i.e. March 2002] motion to a) set aside the [July 2001] judgment [], b) modify child support, c) adjudicate assets omitted from the judgment, and d) adjudicate whether [Husband] breached his fiduciary duties under Family Code section 2102.”

## DISCUSSION

Wife contends the October 28, 2003 order should be reversed because the trial court failed to exercise its discretion to determine whether the November 2002 stipulated order should be set aside on the grounds of mistake. Specifically, she contends the court’s October 28, 2003 order did not address her argument that the November 2002

stipulated order should be vacated because she would not have entered into the stipulation had she known (1) she would still be waiting in August 2003 for the funds from the agreed-upon refinancing of the Stinson Beach residence, and (2) the refinancing package available in August 2003 would require monthly mortgage payments greater than her monthly income. She also contends the trial court erred in failing to award her attorney fees in conjunction with her motion to set aside the November 2002 stipulated order.

### *I. Appealability*

We initially dismissed the appeal on the grounds the October 28, 2003 order reflected only preliminary findings, not a final, appealable ruling. We granted Wife's petition for rehearing because the final sentence of the order--"All other motions are denied"--created an ambiguity regarding its finality, and, insofar as the record on appeal was not yet filed, we were unable to resolve the issue of appealability. We instructed the clerks of the trial and appellate courts to complete the processing of the appeal, and we instructed Wife then to address the issue of appealability in her opening brief. Alternatively, upon the completion of the record on appeal, we permitted Husband to file a motion to dismiss the appeal if he maintained the October 28, 2003 order was not appealable.

Wife contends the October 28, 2003 order is appealable because it was the final denial of her April 2003 motion to set aside or, alternatively, enforce the November 2002 stipulated order and July 2001 judgment.

Husband did not move to dismiss the appeal following completion of the appellate record. In his respondent's brief, he appears to contend the October 28, 2003 order is unappealable because (a) the court denied Wife's motion to vacate the November 2002 stipulated order on June 6, 2003, making her December 30, 2003 appeal from that order untimely, and (b) the October 28, 2003 order did not resolve the motion that remained after the June 6, 2003 ruling, i.e., Wife's motion to "enforce" the November 2002 stipulated order, insofar as the October 28, 2003 order refers to the possibility that Wife,

by her refusal to execute the refinance documents, “may be in violation” of the November 2002 stipulated order.

We conclude the October 28, 2003 order is appealable because it finally resolved all issues raised in Wife’s April 2003 motion. As the above detailed procedural history shows, the trial court addressed the various issues over several continued hearings. The court resolved one issue on June 6, 2003--insufficient evidence of duress to vacate the November 2002 stipulated order--but it continued to August 5 the issue of whether the failure to obtain refinancing affected the validity of the November 2002 stipulated order. On August 5 it again continued its ruling on this issue in order to obtain additional information on the refinancing status. It specifically stated at the conclusion of the August 5 hearing that it had yet “to make a ruling on [Wife’s] motion to set aside the November [2002 stipulated order]” and that it would make that ruling in 60 days, i.e., at the scheduled October 7 continued hearing. Both parties then submitted written arguments and evidence as to why the November 2002 stipulated order should or should not be vacated in light of the refinancing package Husband had by then almost procured, with Wife arguing that when she executed the November 2002 stipulation she was mistaken about the anticipated time to procure the refinancing and the anticipated amount of the loan payments, and Husband arguing her claim of mistake was unwarranted.

The October 28, 2003 order, which derives from the October 7, 2003 hearing, did not explicitly articulate that the court was finally denying Wife’s April 2003 motion to vacate the November 2002 stipulated order. However, on August 5, 2003, when the court set the October 7, 2003 hearing, it stated that it would “make [its] ruling on [Wife’s] motion to set aside” the November 2002 stipulated order at the October 7 hearing. At the conclusion of the October 7 hearing it scheduled no further hearings on Wife’s motion to set aside the November 2002 stipulated order, nor does the October 28, 2003 order refer to any such future scheduled hearings. In the context of the court’s August 5, 2003 statement and the absence of further scheduled hearings, the reasonable construction of the October 28, 2003 order is that it represented the court’s last word on Wife’s April 2003 motion to set aside the November 2002 stipulated order.

Furthermore, because the October 28, 2003 order referred to Wife being in possible violation of the November 2002 stipulated order, the court necessarily deemed the November 2002 stipulated order extant. Had it granted Wife's motion to vacate the stipulated order, there would no longer be an order to violate. Whether she was in violation of the November 2002 stipulated order was not a remaining issue integral to Wife's motion to vacate that stipulated order. It was a separate issue to be raised, should he choose to do so, by Husband in a separate motion.

## II. *Abuse of Discretion*

As Wife recognizes, an order denying a motion to vacate an order or judgment is reviewed under the abuse of discretion standard. (*In re Marriage of Eben-King & King* (2000) 80 Cal.App.4th 92, 118.) Wife also correctly observes that a trial court's failure to exercise its discretion when making a discretionary ruling may constitute an abuse of discretion that warrants reversal on appeal. (See *Gardner v. Superior Court* (1986) 182 Cal.App.3d 335, 338-340.) However, we disagree with Wife that the trial court failed to exercise its discretion as to her argument that the November 2002 stipulated order should be vacated on the grounds of mistake.

The most fundamental rule of appellate review is that the order or judgment appealed from is presumed correct, all intendments and presumptions are indulged to support an order on matters as to which the record is silent, and error must be affirmatively shown. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

Prior to issuance of the trial court's October 28, 2003 order implicitly denying Wife's motion to vacate, both parties submitted extensive written arguments addressing whether the November 2002 stipulated order should be vacated because of Wife's mistaken understanding that the refinancing of the Stinson Beach residence would be pursuant to the lending rates that existed in the fourth quarter of 2002 and would not result in monthly loan payments greater than she was then paying. Thus, the court was fully apprised of their differing positions when it issued the October 28 order. As we noted, *ante*, the court's observation in its October 28 order that Husband had obtained the refinancing, as the November 2002 stipulated order required him to do, and that Wife

might be in violation of that stipulated order because she refused to execute all refinancing documents, necessarily implies the court had concluded the November 2002 stipulated order was valid and should not be set aside.

Conversely, the court observed that the November 2002 stipulated order contained no reference to a “4%, three year, fixed rate loan.” This observation implies the court rejected Wife’s argument that the November 2002 stipulated order should be vacated because it was taken against her through her mistaken understanding that the refinancing terms would be based on the November 2002 lending rates and not result in higher monthly loan payments.

The language of the court’s October 28 order, read in the context of the parties’ preceding written arguments, supports a conclusion that the court exercised its discretion regarding Wife’s assertion of mistake as a ground for vacating the November 2002 stipulated order, even if the court did not refer specifically to this ground, and Wife has not affirmatively demonstrated otherwise on this record. Therefore, we conclude the court did not abuse its discretion in denying her motion to vacate.

### *III. Attorney Fees*

Wife contends the court abused its discretion in denying the request for attorney fees included in her April 2003 motion to vacate the November 2002 stipulated order.

Following entry of judgment in a dissolution proceeding, a court may award attorney fees reasonably necessary to maintain any subsequent proceeding. (Fam. Code, § 2030, subd. (c).) The determination of a motion for attorney fees is left to the sound discretion of the trial court, and it will not be disturbed on appeal absent a clear showing of abuse. (*In re Marriage of Sullivan* (1984) 37 Cal.3d 762, 768.)

We find no abuse. Wife was represented by an attorney in the proceedings leading to the November 2002 stipulated order that she subsequently sought to vacate. She was also awarded attorney fees in conjunction with those November 2002 proceedings, and, according to the appellate record, the attorney who then represented her was her fifth attorney in the course of the dissolution proceedings. The court could reasonably conclude that Wife’s April 2003 motion was initiated as an attempt to relitigate matter

that had been well and fairly resolved and thus was not a proceeding that justified Husband's payment for her attorney fees for its maintenance.

Further, in deciding whether to award attorney fees in marital proceedings, the trial court is required to take into account the parties' relative financial circumstances. (Fam. Code, § 2032.) In the absence of evidence to the contrary, we must presume the trial court complied with its statutory obligation to follow the law. (Evid. Code, § 664; *Thompson v. Thames* (1997) 57 Cal.App.4th 1296, 1308.)

#### *IV. Child Support*

Wife concedes she did not timely appeal the trial court's July 2003 order denying her motion to modify child support. Nevertheless, she requests this court to provide guidance to the trial court regarding any future child support modification motions. We decline to do so.

To the extent Wife now complains the trial court failed to consider Husband's wealth in denying her motion to modify, this court is without jurisdiction to address her claim of error because she did not appeal the order within the allowable time. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 674.) Furthermore, an appellate court's review is limited to and based on the record that resulted in the order or judgment from which the appeal is taken. (See *Reserve Insurance Co. v. Pisciotto* (1982) 30 Cal.3d 800, 813.) Any future request for a modification in child support will necessarily be based on newly-developed circumstances and a wholly different evidentiary record from the one before us in this appeal.

#### *V. Frivolous Appeal*

Husband seeks sanctions against Wife for bringing a frivolous appeal. (Code Civ. Proc., § 907; Cal. Rules of Court, rule 27(e)(1).) For purposes of such sanctions, "frivolous" is generally defined as indisputably "without merit," "for the sole purpose of harassing an opposing party," or to "delay the effect of an adverse judgment." (Code Civ. Proc., § 128.6; *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650.) The objective measure for "indisputably without merit" is whether any reasonable attorney would agree the appeal is totally and completely without merit. (31 Cal.3d at p. 650.)

Under these criteria, Wife’s appeal does not qualify as frivolous. Wife’s asserted ground for vacating the November 2002 stipulated order was her mistaken understanding when she entered the stipulation that the refinancing would occur immediately and not alter the amount of her monthly mortgage payments. Although we have concluded the trial court could reasonably find her asserted ground of mistake insufficient to vacate the November 2002 stipulated order, we cannot say it was unreasonable for Wife’s appellate attorney to deem this issue of mistake arguable. In other words, we cannot say that “any reasonable [attorney] would agree that [Wife’s argument] is totally and completely devoid of merit. . . .” (*Flaherty, supra*, 31 Cal.3d at p. 651.)

#### CONCLUSION

The order is affirmed.

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Jones, P.J.

We concur:

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Simons, J.

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Gemello, J.